June 16, 1999

D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-M

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies.

APPEARANCES: Bruce P. Beausejour, Esq.

185 Franklin Street, Room 1403

Boston, MA 02107

-and-

Robert N. Werlin, Esq.

Keegan, Werlin & Pabian, LLP

21 Custom House Street

Boston, MA 02110

FOR: NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY D/B/A BELL ATLANTIC-MASSACHUSETTS

Petitioner

Keith J. Roland, Esq.

Roland, Fogel, Koblenz & Carr, LLP

1 Columbia Place

Albany, NY 12207

-and-

Paul Kouroupas, Esq.

David Hirsch, Esq.

Regulatory Affairs

1133 21st Street, N.W., Suite 400

2 Lafayette Centre

Washington, DC 20036

FOR: TELEPORT COMMUNICATIONS GROUP, INC.

Petitioner

Todd J. Stein, Esq.

2855 Oak Industrial Drive

Grand Rapids, MI 49506-1277

FOR: BROOKS FIBER COMMUNICATIONS OF MASSACHUSETTS, INC.

Petitioner

Jeffrey F. Jones, Esq.

Jay E. Gruber, Esq.

Laurie S. Gill, Esq.

Kenneth Salinger, Esq.

Palmer & Dodge

One Beacon Street

Boston, MA 02108

-and-

Melinda T. Milberg, Esq.

32 Avenue of the Americas

Room 2700

New York, NY 10013

FOR: AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

Petitioner

Alan Mandl, Esq.

Ottenberg, Dunkless, Mandl & Mandl

260 Franklin Street

Boston, MA 02110

-and-

Hope Barbulescu, Esq.

One International Drive

Rye Brook, NY 10573

FOR: MCI WORLDCOM, INC.

Petitioner

Cathy Thurston, Esq.

1850 M Street, N.W., Suite 1110

Washington, D.C. 20036

FOR: SPRINT COMMUNICATIONS COMPANY, L.P.

Petitioner

Thomas Reilly, Attorney General

By: Daniel Mitchell

Assistant Attorney General

Public Protection Bureau

Regulated Industries Division

200 Portland Street, 4th Floor

Boston, MA 02114

Intervenor

ORDER ON MOTIONS OF BELL ATLANTIC-MASSACHUSETTS FOR RECONSIDERATION AND EXTENSION OF TIME TO FILE AN APPEAL

I. INTRODUCTION

This arbitration proceeding is held pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"). The proceeding is a consolidated arbitration between New England Telephone and Telegraph Company d/b/a/ Bell Atlantic-Massachusetts ("Bell Atlantic," formerly "NYNEX"), the incumbent local exchange carrier ("ILEC"), and its competitors, AT&T Communications of New England ("AT&T"); Brooks WorldCom, Inc. ("Brooks"), formerly Brooks Fiber Communications of Massachusetts, Inc.; MCI WorldCom, Inc. ("MCI WorldCom"), formerly MCI Telecommunications Corporation; Sprint Communications Company L.P. ("Sprint"); and Teleport Communications Group, Inc. ("Teleport"). Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.[(1)]

On March 13, 1998, the Department of Telecommunications and Energy ("Department") issued an Order in this proceeding concerning the provision of unbundled networks elements ("UNEs")[(2)] by Bell Atlantic to the competitive local exchange carriers ("CLECs"). Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-E (1998) ("Phase 4-E Order").[(3)] The Department ruled that, in light of a 1997 decision by the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit Decision"),[(4)] the Department would not require Bell Atlantic to combine UNEs on behalf of competing carriers in the manner prescribed by the FCC, but deemed by the Court to exceed FCC authority under the Act. Phase 4-E Order at 11.

However, we further found that Bell Atlantic's refusal to provide such combinations would impair the successful introduction of competition in Massachusetts. Id. at 12-13. We expressed reservations as to whether Bell Atlantic's requirement that CLECs use collocation as the sole method to combine UNEs was consistent with the Act and the Eighth Circuit's findings, and we proposed that, unless Bell Atlantic could demonstrate that its collocation requirement was consistent with the Act and the Eighth Circuit's finding, it should develop an additional, alternative or supplemental method for provisioning UNEs in such a way that permitted recombination by competing carriers without imposing a facilities requirement on those carriers. Id. at 14. Finally, we noted that Bell Atlantic's refusal to provide UNEs in a manner consistent with the Eighth Circuit's rulings could raise a serious problem in the Department's review of any

subsequent request by Bell Atlantic to offer inter-LATA long distance service under Section 271 of the Act. Id. at 13-15.

On January 25, 1999, the Supreme Court of the United States reversed the Eighth Circuit on several key points. AT&T Corp. et al. v. Iowa Utilities Board et al., No. 97-826, slip op. (U.S. January 25, 1999) ("AT&T Corp."). The Supreme Court ruled on several issues germane to the present proceeding. First, it reversed the Eighth Circuit's ruling on the issue of already-combined UNEs, and concluded that the FCC did not err in establishing Rule 315(b), which prohibits an incumbent from separating already-combined network elements before leasing them to a competitor. AT&T Corp. at 25-28. See also, 47 C.F.R. § 51.315(b). The Court also overruled the Eighth Circuit's ruling on the validity of Rule 319, which designated the range of UNEs to be provided to CLECs. Id. at 19-25. The Court vacated Rule 319 and remanded this section of the rules to the FCC for further consideration. Third, the Court affirmed the FCC's authority to design a pricing method for UNEs. AT&T Corp. at 17. Fourth, the Supreme Court upheld the FCC's refusal to impose a facilities ownership requirement for access to UNEs. AT&T Corp. at 25.

On March 19, 1999, the Department issued an Order on the effect of the Supreme Court ruling on the UNE combinations portion of the Consolidated Arbitrations. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4-J (1999) ("Phase 4-J Order"). The Department relied on commitments made by Bell Atlantic to the FCC in its February 8, 1999 letter where it stated that it will continue to offer the UNEs contained in Rule 319 and in existing interconnection agreements.[(5)] The Department noted that each of the Department-approved interconnection agreements between Bell Atlantic and the parties in this case includes a clear statement that Bell Atlantic will provide the full list of FCC-designated UNEs to the CLECs, and that these interconnection agreements also provide that Bell Atlantic will provide dark fiber, a UNE on which the FCC deferred to state action and one that this Department ordered Bell Atlantic to provide. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 3, at 49 (1996). The Department ordered that Bell Atlantic, consistent with its February 8, 1999 representation to the FCC, make available the UNEs included in the Rule 319 UNE list and in existing interconnection agreements, to carriers with interconnection agreements and to carriers that seek that list during new negotiations. The Department also ruled, consistent with the recent Supreme Court decision, that Bell Atlantic shall make existing combined UNEs, including the UNE platform, available to all CLECs in their combined form. Finally, because the interconnection agreements do not provide for a fee for maintaining an existing combination of UNEs (i.e., a "glue charge"), the Department prohibited Bell Atlantic from assessing such a fee.

On April 8, 1999, Bell Atlantic filed with the Department a Motion for Reconsideration and Motion for Extension of Time for Filing an Appeal. On April 16, 1999, AT&T and MCI WorldCom filed oppositions to Bell Atlantic's Motion for Reconsideration. This Order addresses Bell Atlantic's motions.

II. MOTION FOR RECONSIDERATION

A. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within 20 days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

B. POSITIONS OF THE PARTIES

- Bell Atlantic

Bell Atlantic asserts that the Department's decision in the Phase 4-J Order was based on a mistaken interpretation of a representation Bell Atlantic made in its February 8, 1999 letter to the FCC following the Supreme Court's ruling in AT&T Corp. Bell Atlantic maintains that it represented to the FCC that it would continue to provide individual network elements identified in Rule 319 pending the FCC's completion of its rulemaking to identify network elements that must be unbundled, but that the representation did not extend to the provision of network element combinations. Bell Atlantic contends that the Department misread its "agreement" with the FCC, and that "agreement" does not support the Department's conclusion that Bell Atlantic must provide UNE combinations prior to the FCC's reconsideration of this issue. Bell Atlantic submits another letter from its General Counsel to the FCC, dated March 25, 1999, which it states clarifies its agreement with the FCC[(6)] (Bell Atlantic Motion for Reconsideration, Exhibit A).

Bell Atlantic also argues that the Department's Phase 4-J Order was premature.[(7)] It is Bell Atlantic's position that, according to the Supreme Court, combinations of UNEs could not be required until the FCC applies the correct standard and identifies the specific UNEs that must be provided under the Act. Further, according to Bell Atlantic, it is the

FCC and not the states that has been charged in the first instance with identifying what network elements must be offered by an ILEC to its competitors (id. at 4-5).

Bell Atlantic concludes that the Department should reconsider its Order because it was based upon mistake and inadvertence (id. at 1-2).

- AT&T

AT&T opposes Bell Atlantic's Motion for Reconsideration, arguing that the Phase 4-J Order was not the result of mistake or inadvertence. According to AT&T, the Department's decision to require Bell Atlantic to provide pre-existing combinations of elements was based on the Supreme Court's decision to reinstate the FCC rule relating to this matter, 47 C.F.R. § 51.315(b), and not on a supposed voluntary undertaking by Bell Atlantic in its February 8, 1999 letter. In addition to Bell Atlantic's commitment to the FCC to provide certain network elements, AT&T maintains that Bell Atlantic also has a binding obligation under existing interconnection agreements to provide specified network elements. AT&T asserts that the Department properly held Bell Atlantic to its commitments when it rejected the assertion that Bell Atlantic need not offer UNE combinations until the FCC provides a revised definition of the individual network elements (AT&T Opposition at 2-4).[(8)]

- MCI WorldCom

MCI WorldCom makes similar arguments as AT&T, stating that the Department's decision in the Phase 4-J Order did not rest on Bell Atlantic's promises to the FCC, but instead on a Supreme Court mandate that Bell Atlantic provide combinations to competitors (MCI WorldCom Opposition at 3-6). In addition, MCI WorldCom responds to Bell Atlantic's implementation concerns by stating that the Supreme Court decision does not sanction the sort of limitations and restrictions proposed by Bell Atlantic to its obligation to provide combinations of UNEs . MCI WorldCom also asserts that Bell Atlantic is capable of offering combinations in Massachusetts without delay (id. at 6-7).

C. ANALYSIS AND FINDINGS

Bell Atlantic asserts that the Department's view of the February 8, 1999 letter did not accurately reflect the understanding between Bell Atlantic and the FCC. Bell Atlantic contends that a follow-up letter of March 25, 1999, clarifies that agreement. We do not have on this record any indication that there is an "agreement" between Bell Atlantic and the FCC; we have only correspondence from the company to the regulatory agency. Thus, we cannot accept Bell Atlantic's contention that the FCC has concurred with the language in its second letter.

Even if the FCC has concurred, through action or inaction, though, we cannot accept Bell Atlantic's interpretation of its "clarification." The issue here is simple: Bell Atlantic has agreed to provide the UNEs to which it has previously committed in interconnection agreements in Massachusetts, and which are defined in the FCC's Rule 319. The Supreme

Court has ruled that UNEs which have been previously combined cannot be disassembled. Bell Atlantic cannot, on the one hand, agree to abide by its contractual commitments, and, on the other, argue that those commitments are not subject to the highest law in the land.

Our decision to require Bell Atlantic to provide already-combined UNEs was not based on a misreading of the February 8, 1999 letter. We made no mistake, and there was no inadvertence nor mistaken interpretation. Consequently, Bell Atlantic's Motion for Reconsideration is denied.

In addition, Bell Atlantic made a further request in a footnote that, if the Department does not grant the Company's Motion, then the Department "should permit BA-MA to come forward with a proposal for reasonable limitations" (Bell Atlantic Motion for Reconsideration at 5 n.2). Bell Atlantic asserts the need for "reasonable limitations," which are not specified or described, based on its contention that "there may be implementation issues associated with supporting certain element combinations that could require a commitment of substantial resources" (id.). Bell Atlantic expressed its concern about committing these resources, given the uncertainty surrounding the FCC's rulemaking on the remanded list of UNEs. It is clear from previous evidence in this case that the disassembling of previously combined UNEs is, in fact, a wasteful practice (see Phase 4-E Order at 11-12), and this evidence must be given greater weight than Bell Atlantic's unsupported contentions in a footnote about implementation issues that "may" occur with respect to "certain" elements, which "could" require a waste of resources. The time to have raised this point was before, not after, the record closed. See, e.g., Boston Gas Company, D.P.U. 88-67 (Phase II) at 6-9 (1989). Therefore, our directives in the Phase 4-J Order need no further modification or limitation.

III. MOTION FOR EXTENSION OF THE JUDICIAL APPEAL PERIOD

A. STANDARD OF REVIEW

G.L. c. 25, § 5, provides in pertinent part that an appeal of a final Department Order must be filed with the Department no later than 20 days after service of the order "or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said ... decision or ruling." See also 220 C.M.R. § 1.11(11).

The twenty-day appeal deadline indicates a clear intention on the part of the legislature and the Department to ensure that the decision of an aggrieved party to appeal a final order of the Department be made expeditiously. Swift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders Nunnally, D.P.U. 92-34-A at 4 (1993).

The Department's procedural rules state that reasonable extensions of the appeal period shall be granted upon a showing of good cause. 220 C.M.R. § 1.11(11). In determining what constitutes good cause, the Department has stated:

Good cause is a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party.

Boston Edison Company, D.P.U. 90-355-A at 4 (1992).

B. ANALYSIS AND FINDINGS

Bell Atlantic requests additional time to file an appeal of the Department's Phase 4-J Order until 20 days after the Department issues its Order on Bell Atlantic's Motion for Reconsideration. However, the time for Bell Atlantic to appeal a decision of the Department on an arbitrated issue is after the decision has been incorporated into an interconnection agreement, and the Department issues an Order approving or rejecting the interconnection agreement. See 47 U.S.C. § 252(e)(6) (party aggrieved by state commission determination may bring action in federal district court to determine whether the agreement ... meets the requirements of sections 251 and 252). Bell Atlantic has already requested and the Department has approved an extension of the time to file an appeal [(9)] of the Department's approval of its interconnection agreement with AT&T.[(10)] In its request, Bell Atlantic stated that it "believes that it would be inefficient and wasteful of resources of the parties, the Department, and the Courts ... to bring an [court] action at this time given the pendency of further proceedings on the open issues noted above." One of the noted issues was UNE combinations. The previously-granted extension covers the subject matter of the Phase 4-J Order which is the subject of this request for additional time.[(11)] Therefore, it is unnecessary for the Department to grant this extension again, and Bell Atlantic's Motion for Extension of Time for Filing An Appeal is therefore denied.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That Bell Atlantic's Motion for Reconsideration is hereby denied; and it is

FURTHER ORDERED: That Bell Atlantic's Motion for Extension of Time for Filing an Appeal is hereby denied.

By Order of the Department,

_____

Janet Gail Besser, Chair

_____

James Connelly, Commissioner

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

_____

Eugene J. Sullivan, Jr., Commissioner

1. Since the start of these arbitrations, AT&T acquired Teleport, and MCI WorldCom acquired Brooks. AT&T assumed representation for Teleport and MCI WorldCom assumed representation for Brooks. Thus, the remaining parties are Bell Atlantic, AT&T, MCI WorldCom, and Sprint.

2. UNEs are parts of the telephone network that one carrier leases from another carrier to provide telecommunications services. See 47 U.S.C. § 251(c)(3).

3. On April 30, 1998, the Department issued an Order denying MCI WorldCom's Motion for Reconsideration and Petition to Open an Investigation. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-F (1998).

4. Iowa Utilities Board , et al., Petitioners v. Federal Communications Commission; United States of America, Respondent, 120 F. 3d 753 (8th Cir., July 18, 1997, as amended on rehearing on October 14, 1997) (1997). The Eighth Circuit Court vacated, inter alia, the FCC's rule requiring ILECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carrier on an unbundled basis. Id. at 813. The Eighth Circuit found that these rules could not "be squared with the terms of subsection 251(c)(3)." Id.

5. Letter from Edward D. Young, III, General Counsel, Bell Atlantic Corporation to Lawrence Strickling, Chief of the FCC's Common Carrier Bureau, dated February 8, 1999.

6. Letter from Edward D. Young, III, General Counsel, Bell Atlantic Corporation, to Lawrence Strickling, Chief of the FCC's Common Carrier Bureau, dated March 25, 1999.

7. In a footnote, Bell Atlantic expresses its concern that implementation of the combination requirements of the Phase 4-J Order could require a commitment of substantial resources. Bell Atlantic urges that if the Department does not grant this Motion for Reconsideration, it should permit Bell Atlantic to submit a proposal for reasonable limitations (Motion for Reconsideration at 5 n.2).

8. AT&T disputes a footnote in the Phase 4-J Order, which states that the Eighth Circuit ruling vacating the FCC's rules that required ILECs to combine network elements for competitors was not on appeal, and that those rules remain vacated. Phase 4-J Order, at 4 n.7. According to AT&T, the Eighth Circuit's reasoning for vacating those rules was overturned by the Supreme Court, and the issue is again before the Eighth Circuit. Because the scope of this Order does not include a determination of whether the Department should order combinations of UNEs which are not currently combined, the Department will not address AT&T's dispute with our Phase 4-J Order. The Department will state, however, that the Supreme Court did not explicitly address the FCC's vacated rules, and absent further word from the Supreme Court or the Eighth Circuit, these rules remain vacated.

9. The Department approved the Joint Motion of Bell Atlantic-Massachusetts and AT&T Communications of New England, Inc. for Extension of Appeal Period on June 24, 1998.

10. The Department's approval of Bell Atlantic's interconnection agreement with MCI WorldCom is currently on appeal. MCI Telecommunications Corp. et al. v. New England Telephone et al., U.S. District Court No. 98-CV-12375-RCL (District of Massachusetts).

The Department approved Bell Atlantic's interconnection agreement with Sprint on July 17, 1998. Sprint/Bell Atlantic Interconnection Agreement, D.T.E. 98-60 (1998). No request for extension of the appeal period was filed in that matter.

11. In addition, pursuant to Department-approved interconnection agreements between Bell Atlantic and AT&T, MCI WorldCom, and Sprint, the parties have agreed to renegotiate provisions in their respective agreements which are changed by Department Orders. Amendments to Department-approved interconnection agreements would then be submitted to the Department for approval. Parties would have the opportunity to challenge the Department's determination at that time.